IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 12.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal Nos.542 & 1570 of 1995

SA 542/95

Kamaruddin Saheb ... Appellant/2nd Defendant

Vs.

1. K.T.Palaniappa Nadar (Died)

2. K.B.Pandiyan
3. Selvi
4. District Collector of South Arcot,
Vallalar District,
Collectorate Building, Manjakuppam
Cuddalore. NT
5. K.P.Senguttuvan
6. K.P.Moorthy
7. K.P.Cheran
8. Kalaichelvi
R5 to R8 are brought on record as L.R's.of the deceased 1st respondent vide order of court dated 15.09.2003 made in C.M.P.No.3373 of 1998

SA 1570 of 1995

The District Collector of South Arcot
Vallalar District having office
at the Collectorate Buildings
Manjakuppam Cuddalore NT .. Appellant (First Defendant)

Vs

1. K.T.Palaniappa Nadar (Died)
2. K.B.Pandiyan
3. Selvi
4. S. Kamardeen Sahib
5. K.P.Senguttuvan
6. K.P.Moorthy

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7. Tmt Kalaichelvi
8. K.P.Cheran .. Respondents (Plaintiff and 2nd Defendant)

R5 to R8 are brought on record as L.R's.of the deceased 1st respondent vide order of court dated 23.03.2007 made in C.M.P.No.10361 to 10363/06

PRAYER IN S.A.No.542 of 1995: Second Appeal against the Judgment and decree dated 06.01.1995 in A.S.No.162 of 1993 on the file of Sub Court, Cuddalore reversing the judgement and decree dated 20.04.1993 in O.S.No.373 of 1989 on the file of the Additional District Munsif Court, Cuddalore.

PRAYER IN S.A.No.1570 of 1995: Second Appeal against the Judgment and decree dated 06.01.1995 made in A.S.No.162 of 1993 by the learned subordinate Judge, Cuddalore. Reversing the Judgment and Decree dated 20.04.1993 in OS No. 373 of 1989 on the file of the Additional District Munsif Court, Cuddalore.

For Appellant : Mr.R.Subbaiah
Spl.Government Pleader(CS)
in S.A.No.1570 of 1995 and
R4 in S.A.No.542 of 1995
Appellant M/s.K.Kannan for
Mr.R.Yashod Vardhan for
Appellant in SA 542/95 and for R4
in S.A.No.1570 of 1995

For Respondents : Mr.S.V.Jayaraman, S.C.for
M/s.B.Soundarapandian for
R2,R3 and R5 to R8 in both appeals

COMMON JUDGEMENT

The first and second defendants in O.S.No.373 of 1989 have filed the Second Appeal No.1570 of 1995 and 542 of 1995 respectively. Respondents 1 to 3 have filed the suit in O.S.No.373 of 1989 against the appellant District Collector in Second Appeal No.1570 of 1995 and 542 of 1995 arraying them as defendants 1 and 2 respectively praying for a declaration of title in respect of the suit properties and delivery of possession. The suit property consisting of six items of punja lands stating that they belonged to one Periyasamy Nadar and his two sons, namely, Balamuruga Nadar who is the father of the second plaintiff and Palaniyappa Nadar. The first plaintiff is also the son of

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Periyasamy Nadar. The said Periyasamy Nadar as well as Balagurusamy Nadar have died and his son is the second plaintiff.

2. According to the plaintiffs, the said Periyasamy Nadar and his sons Palaniyappa Nadar and Balagurusamy Nadar have executed a settlement deed on 24.06.1953 marked as Ex.A.1 in favour of the then District Board. The said property is now transferred in the name of the District Collector, appellant in S.A.No.1570 of 1995 and under the said settlement deed the property was given to the District Board for the purpose of starting a High School and the same was accepted by the District Board in the resolution dated 27.06.1953 marked as Ex.A.2. However, the purpose for which the property was given in favour of the first defendant was not given effect to and school was not stated.

3. On the other hand, the District Board has purchased some other property in the same area and started a school. Therefore, the purpose for which the property was given has not been effected and it remains a vacant land. In those circumstances, the first plaintiff has requested the first defendant to return the property by a letter dated 08.04.1983. The first defendant by reply dated 23.05.1953 marked as Ex.A.3 directed the first plaintiff to approach the District Revenue Officer to get back the property. In spite of his efforts the property was not returned. The Tahsildar of Cuddalore by his letter dated 30.08.1983 marked as Ex.A.4 addressed to the first defendant stated that the property is not used for any other purpose and therefore, the same can be given to the plaintiff. Thereafter, the plaintiffs have given notice for possession and ultimately the plaintiffs have approached this Court by filing W.P.No.8631 of 1985 in which by an order dated 23.08.1985 marked as Ex.A.8, this Court having found that for 32 years the purpose for which the property was given, has not been achieved and therefore, it is open to the plaintiffs to approach the Civil Court and with that observation the writ petition was dismissed stating that the dismissal shall not be construed against the plaintiff.

4. It was thereafter, the first plaintiff by a document dated 06.09.1985 marked as Ex.A.9 has revoked the settlement deed and informed the same to the first defendant. The second defendant who is in occupation of a portion of the said property is not entitled to be in possession and therefore, the present suit is filed for a declaration and possession. The first defendant has resisted the suit stating that even though it is true that no school has been constructed and another school has been started in another place which requires extension and therefore, the first defendant proposes to use the suit property for the same purpose. The first defendant denies the possession in favour of the second defendant and it is the case of the first

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defendant that they are in possession of the entire property and the revocation of settlement deed is not valid. The second defendant has also filed a written statement in the same line.

5. The Trial Court after elaborate trial has dismissed the suit holding that the settlement deed marked as Ex.A.1 cannot be revoked under Ex.A.9 and the plaintiffs themselves have not approached the Civil Court for the purpose of cancellation of the settlement deed and therefore, the plaintiffs are not entitled for declaration and possession. Aggrieved by the said judgement of the Trial Court the plaintiffs filed the First Appeal. The First Appellate Court has allowed the appeal and granted a decree in the suit by directing the respondents to surrender vacant possession to the plaintiffs. It was as against the said judgement the first and second respondents in the first appeal have filed the above said two appeals.

6. While admitting the said appeals the following substantial questions of law were framed in S.A.No.1570 of 1995 and 542 of 1995:

> Questions of Law in S.A.No.542 of 1995
> "Whether the lower appellate court is correct in holding that in view of the revocation of the settlement deed executed in favour of the Government there exists no need for considering the plea of adverse possession taken by the defendant all through?"
>
> Question of Law in S.A.No.1570 of 1995
> "1. Whether the suit for declaration of plaintiffs' title and recovery of possession of the suit property is maintainable without there being a regular suit to set aside the settlement deed dated 24.06.1953 by the plaintiffs?
> 2. Whether the unilateral revocation of the settlement deed by the plaintiffs would be binding on the appellant?
> 3. When there is no time limit fixed for the construction of the school building, whether the First Appellate Court was correct in holding that the conditions imposed in the settlement deed have not been carried out?"

7. It is seen that while the first defendant in the suit based on the original settlement deed dated 24.06.1953 marked as Ex.A.1 claims to be in possession of all the six items of properties, the second defendant who is the appellant in Second Appeal No.542 of 1995 claims to be in possession of a portion, namely, in item No.6 of the suit properties, of course claiming title on the basis of adverse possession. The First Appellate

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court since relied upon the revocation deed executed by the first plaintiff, dated 06.09.1985 marked as Ex.A.9 revoking the earlier settlement deed, namely, Ex.A.1 and therefore, has come to a conclusion that there is no need to consider the plea of adverse possession pleaded by the second defendant, has also passed a decree against the second defendant also.

8. Mr.R.Subbiah, learned Special Government Pleader appearing for the appellants in Second Appeal No.1570 of 1995 would submit that inasmuch as Ex.A.1 settlement deed remains a gift as admittedly accepted by the donees as seen in the plaint itself, the revocation or suspension of such gift will arise only if the donor and donee agree to revoke or suspend on the happening of a specified event which does not depend on the donors will. He would also state that as per Section 126 of the Transfer of Property Act, except in the circumstances mentioned therein as stated above and also in case of rescission, a gift cannot be revoked. He would also rely upon Section 33 of the Transfer of Property Act, to contend that inasmuch as there is no time limit prescribed under Ex.A.1 for the purpose of implementing the purpose for which the property was transferred and the first defendant has not taken any decision for the purpose of making the purpose impossible since they desire to use it for the same purpose, there was no question of revocation of Ex.A.1.

9. He would also submit that Ex.A.1 does not contain any clause for the purpose of revocation and there was no agreement for revocation on the happening or non happening of a specified event and therefore, Section 126 of the Transfer of Property Act, will not apply. To substantiate his contention he would rely upon the judgements reported in AIR 2003 H.P. 107, AIR 2002 Madras 1 and AIR 1986 Kerala 110

10. On the other hand, Mr.K.Kannan, learned counsel appearing for the appellant in the Second Appeal in S.A.No.542 of 1995 has contended that the second defendant is in possession of a portion of item 6 of the schedule property. While item 6 is to the extent of 20 cents the second defendant is in occupation of 8 cents, as it is stated in the plaint while in the written statement the second defendant himself claimed a lesser extent and he also claims adverse possession on the basis of various documents which are filed under Exs.B.1 to B.20 etc. to show that he has been in possession for a long period and even before his birth his predecessors in title have been in possession for which he has also examined witness on his side as D.W.4.

11. He would also submit that as far as the second defendant is concerned since he has been in possession for many years and his predecessors have been in possession even before his birth, it

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is not necessary that he should be in possession to the knowledge of the true owner as long as his possession is hostile and notorious and exclusive in its character, since the requirement of adverse possession must be continuity and publicity and in extent and therefore, by relying upon the judgement of the Division Bench of this Court in 1998 LW 606, he would argue that he need not recognize the right of the plaintiff and the very fact that he has been enjoying the property publicly with animosity is sufficient to prove his possession.

12. On the other hand, Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondents in these appeals who were the plaintiffs would submit that as far as the 2nd defendant's possession is concerned it is not with an intention to possess and therefore, the requirement of animus possidendi is lacking. According to him under Section 77(c) of the Indian Trust Act, the plaintiffs have a right to revoke trust as long as it is admitted by the first defendant that for nearly 35 years they have not used the property for the purpose for which it was entrusted to them. He would also submit that by the conduct of the first defendant in putting up the school in some other place amounts to frustration of the very object of the trust. He would submit that the property has been entrusted for a public purpose and inasmuch as the purpose has not been accomplished, under Section 77(c) of the Indian Trust Act, 1882, the trust stands extinguished. To support his contention he would also rely upon the judgement reported in AIR 1923 Lahore 93.

13. It is not in dispute that under Ex.A.1 settlement deed the six items of properties have been gifted to the first defendant for the purpose of construction of a High School. It is also true that the said document does not stipulate any condition for the purpose of cancellation and no time limit has been fixed for the purpose of putting up the construction. In such circumstances, the contentions raised by the appellants especially the District Collector is based on Section 126 of the Transfer of Property Act. It explains the circumstances where a gift may suspended or revoked. The said Section, which reads as follows:

> "126. When gift may be suspended or revoked.- The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.
>
> A gift may also be revoked in any of the case (save want or failure of consideration) in which, if it were a contract, it might be rescinded.
>
> Save as aforesaid, a gift cannot be revoked.
>
> Nothing contained in this section shall be deemed

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to affect the rights of transferees for consideration without notice."

14. Therefore, under the said section both the donor and donee can revoke a gift on the happening of a specified event, which is not exclusively within the domain of the donor or in cases where there is rescission of contract. Except in these two cases gift cannot be revoked. A reading of Ex.A.1 shows that there is no stipulation that on the happening of specified event, namely, that if the first defendant fails to put up a construction of a school the gift can be revoked.

15. The term gift is defined under Section 122 of the Transfer of Property Act as

"Gift is a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee."

16. Therefore, by construing Ex.A.1 which has no doubt been accepted by the donee, namely, the first defendant since the property has been given for public purpose as per the requirement of the Transfer of Property Act, there is no difficulty to come to the conclusion that the transfer by way of gift has been effected and there is no agreement between the donor and donee for the purpose of revocation on the happening of a specified event. One other circumstance, under which a gift can be revoked under Section 126 of the Transfer of Property Act, is when the contract of gift is rescinded. The term "rescission" is used under the Indian Contract Act, as one of the circumstances under which by agreement between parties the obligation need not be performed. The said Section 62, which runs as follows:

"62. Effect of novation, rescission, and alteration of contract.- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

17. For the purpose of effecting rescission, wherein the party to the contract can be permitted not to perform his obligation under the terms of the contract which includes the other specie, namely, novation and alteration. The same must be based on the consensus between the parties to the contract, which may arise either by the subsequent agreement between the parties or a new contract can be created or the old obligation can be dispensed with. That was the decision given by the Hon'ble Supreme Court in City Bank, N.A. Vs. Standard chartered Bank and others reported in 2004(1) SCC 12. Therefore, on the face of it there is no difficulty to come to the conclusion the said Section

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63 of the Indian Contract Act which arises on the consensus between the parties to the contract was distinguished by the Hon'ble Supreme Court to Section 62 wherein one of the parties can act unilaterally. The operative portion of the judgement of the Hon'ble Supreme Court is as follows:

> "47. Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. The Special Court was right in observing that Section 62 would not be applicable as there was no novation of the contract. Further, it is neither Citi Bank's nor CMF's case nor even SCB's case that there was a tripartite arrangement between the parties by which CMF was to accept the liability. Such a case of novation does not arise for consideration. Shri Andhyarujina, the learned Senior Counsel for Citi Bank has also not seriously pressed for Citi Bank's case being considered by reference to Section 61 abovesaid."

18. Therefore, it is clear that both the factors as contemplated under Section 126 of the Transfer of Property Act, for the purpose of revocation of Ex.A.1 are not available in this case.

19. On the other hand the learned First Appellate Judge has decided the issue in favour of the plaintiffs based on Section 77 of the Indian Trust Act. It is no doubt true that under the Indian Trust Act Section 3, while deciding about the trust states that it is

> "an obligation annexed to the ownership of properties and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or another and the owner"

and that under Section 77 of the Indian Trust Act, the trust is extinguished

> "a) When its purpose is completely fulfilled or
> b) When its purpose becomes unlawful or
> c) When fulfillment of its purpose becomes impossible by destruction of the trust property or otherwise or
> d) When the trust being revocable is expressly revoked."

20. Admittedly even assuming that the pleading is a trust and there is an entrustment for a purpose the present situation will not be suited to the first, second and fourth category and if at all there is any iota of application it will be under Section

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77(C) where it may be said that the purpose becomes impossible by destruction of the trust property or otherwise.

21. In the present case it is not even the case of the plaintiffs that the property has been destroyed by the first defendant. Therefore the first portion of the 77(c) does not apply. But the only remaining word is "otherwise" that means the fulfillment of purpose becomes impossible otherwise. It is on the basis of this term the learned First Appellate Judge has assumed that the object of trust for which it was entrusted has not been completed and therefore has come to a conclusion that there is a extinguishment of trust under Section 77 of the Act. I do not think that the present situation can be effected with any one of the four circumstances under Section 77 of the Indian Trust Act. Even assuming that a trust has been created in this case, inasmuch as there is no time limit prescribed under Ex.A.1 for the purpose of building up a High school for public purpose as it was intended by the settlers under Ex.A.1 I do not think that the trust stands extinguished. In any event it is not even the pleadings of the parties that under Ex.A.1 a trust has been created. Therefore, the decision arrived by the first Appellate Court is wrong and not with proper reasoning.

22. On the other hand it has been the specific case of the parties that it is a gift given voluntarily for a specified purpose and the same has been accepted. In the absence of any time limit given under Ex.A.1 for the purpose of the object of the gift to be achieved and in the absence of the application of Section 126 of Transfer of Property Act, I do not think that the conduct of the plaintiffs in revoking Ex.A.1 settlement deed by a revocation deed dated 06.09.1985 under Ex.A.9 is valid in law. In any event as it is correctly pointed out by the learned counsel for the appellants, the plaintiffs has not even come to the Court for the purpose of declaration that the gift has become void and unilateral decision taken by them under Ex.A.9 is not permissible in law.

23. It is in this regard relevant to point out the pronouncement of the legal position by this Court rendered in Kasi Gounder Vs. Chinnapaiya Gounder reported in AIR 2002 Madras 1 wherein while referring to Section 126 of the Transfer of Property Act, this Court has held as follows:

> "18. It is also evidently clear that the settlement deed was duly executed by Manickam Ammal in favour of the plaintiff under Ex.A.4 and when once it has been executed, she has no power to cancel the same. Even assuming that the plaintiff had failed to maintain her as contended in the revocation deed, I am of the view, it is not a ground to revoke the document. Under the

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circumstances, the reliance upon the subsequent settlement deed by the defendant in his favour is of no use. Hence, the lower appellate Court rightly came to the conclusion that the plaintiff has got title to the property and under the circumstance, the plaintiff is also entitled to recovery of possession."

24. A similar view was taken by the Himachal Pradesh High Court in Thokha Vs. Smt.Biru and others reported in AIR 2003 H.P.107 wherein also while referring to Section 126 of the Transfer of Property Act, the High Court has held as follows:

"22. In the case in hand there is no specific condition either for giving maintenance or for revoking of the gift deed in case services are stopped to be rendered by the donee. Anyway, the fact remains, as has been stated in the deed of gift that the gift was in lieu of services meaning thereby that the donee had to render services to the donor-plaintiff but in the absence of any specific condition in the event of failure of the donee to render services, the gift could not be revoked. Thus, the deed of gift Ext.D.1 if considered as an outcome of general law cannot be said to be revocable one when no specific condition for its revocation has been made in the deed itself in the event of failure of the donee to provide services to the donor or maintain the donor, the gift cannot be revoked."

25. The reliance placed on by the learned Senior Counsel for the respondents, on the judgement of the Lahore High Court in Gela Ram Vs. The District Board, Muzaffargarh reported in AIR 1923 Lahoore 93 is not applicable to the facts of the case, since that was the case wherein the land given for a public purpose was sold by the public authority to the third parties and in those circumstances by invoking Section 77(c) of the Indian Trust Act, it was held that when a property was given for a public Highway no building can be put up on it or by way of sale to third parties.

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26. In view of the above said facts I am of the considered view that the learned First Appellate Judge has not appreciated the legal position as per the Transfer of Property Act and the Trust Act in their proper perspective and therefore, the judgement and decree of the First Appellate Court is set aside and the Second Appeals stand allowed. No cost.

Nbj

Sd/
Asst.Registrar

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Sub Asst.Registrar

To
The Subordinate Judge
Cuddalore

2. The Additional District Munsif
Cuddalore

3. The Record Keeper, VR Section, High Court
Madas

+2cc to Mr. B. Sankarapandian, Advocate sr no. 23712
+ one cc to Mr. R. Yashod Vardhan, Advocate sr no. 23790
+ one cc to the Government Pleader sr no. 23851

vc(Co)
nm(13.08.07)

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